IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.315 OF 1996

Smt. Jijabai Baban Hirnaik,)
residing at Hut No. 512, Shiv-Shankar)
Nagar, Saltpan Road, Wadala, Bombay.) .....Petitioner.

V/s

(1) Shri Santosh Govind Tari,)
at present residing at 20/5, B.P.T.)
Colony, Nadkarni Park, Wadala, (East))
Bombay - 400 057.)

(2) Shri Anant Govind Tari,)
at present residing at Village - Wadatar)
Post Jamsande, Taluka - Dreogad)
District : Sindhudurg.)

(3) Shri Sashikant Dattaram)
Malgaonkar, at present residing at)
20/5, B.P.T. Old Colony, Nadkarni)
Park, Wadala (East), Bombay 400 057)

(4) Smt. Surekha Santosh Tari)

at present residing at 20/5, B.P.T.)
Colony, Old Colony, Nadkarni Park,)
Wadala (East), Bombay - 400 057)

(5) State of Maharashtra) ....Respondents.

Mr. P.R. Naidu for the petitioner.

Mrs. Suvarna Telgote for respondent Nos. 1 to 4.

Ms. S.V. Gajare, APP for the State.

CORAM: V.M. KANADE, J.

DATE : 8th September, 2006

ORAL JUDGMENT:

1. By this Criminal Revision Application, the original complainant has challenged the order of acquittal which is passed by the Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai whereby the respondents / accused were acquitted of the offence punishable under section 326 read with section 114 of the Indian Penal Code.

2. Brief facts which are relevant for the purpose of deciding this Revision Application are as under:-

3. A criminal complaint was lodged by the Petitioner at Wadala Police Station, alleging that the respondent Nos. 1 to 4 had assaulted her and her husband and had committed an offence punishable under section 326 read with section 114 of the Indian Penal Code. The Investigating Officer recorded the statements of witnesses and a charge-sheet was filed in the trial court. The prosecution relied on the statement of the Petitioner who was injured in the said incident. The prosecution also relied on the evidence of doctor who had treated both the husband and wife and had produced the medical record disclosing the treatment which was taken by the petitioner and her husband and injuries which were inflicted by the assailants. The learned Magistrate, however, did not accept the testimony of the petitioner and came to the conclusion that there were number of material contradictions in the statements of both the eye witnesses and that, admittedly, there was an enmity between the petitioner and the respondent Nos. 1 to 4 and, therefore, it

was not possible to accept their testimony particularly when there was no corroboration to their testimony by any independent witness. The trial court further observed that the injuries which were found on the person of the petitioner could have been caused by a fall and relied on the admission which was given by the doctor in his cross-examination. The trial court further observed that, according to the petitioner and her husband, it was dark at night and, therefore, the trial court felt that even assuming that the petitioner was assaulted, it was difficult to believe her testimony that respondents were responsible for attacking her. The trial court, therefore, acquitted all the accused.

4. Unfortunately, for the petitioner, though efforts were made by her to persuade State to file appeal, no appeal came to be filed by the State and, therefore, there was no option for the petitioner but to approach this Court by filing a Criminal Revision Application which was admitted. Even after admission of this Criminal Revision Application, the State chose not to prefer any appeal against the acquitted accused. As a result, therefore, statutory appeal, as provided

under the Criminal Procedure Code, is not preferred by the State and only this Criminal Revision Applications remains to be decided.

5. The learned Counsel appearing on behalf of the petitioner very vehemently submitted that the trial court had committed an error of law by discarding the testimony of the petitioner particularly when she was grievously injured in the said assault which is evident from the testimony of doctor who had examined her. He submitted that in the light of the statement of the petitioner which was corroborated by her husband, the question of further corroboration through any other independent witness did not arise and the trial court, therefore, erred in discarding the testimony of the petitioner and her husband on the ground that no independent witness has been examined. He further submitted that the trial court further erred in not taking into consideration the injuries which were found on the person of the petitioner by holding that such injuries were possible due to fall. He submitted that, therefore, this Court should convict the accused on the basis of testimony of the petitioner and her husband and the

medical evidence which is on record, after setting aside the judgment and order passed by the learned Magistrate. He relied on the judgment and Order of the Apex Court and various High Courts.

6. The learned Counsel appearing on behalf of the respondent Nos. 1 to 4 relied upon the judgment of the Supreme Court in the case of D. Stephens Vs. Nosibolla reported in AIR (38) 1951 SC 196 wherein it was held that the revisional jurisdiction conferred on the High Court under section 439 of the Criminal Procedure Code should not be lightly exercised when it is invoked by a private complainant against the order of acquittal against which the Government has a right of appeal under section 417.

7. Before considering the rival submissions, it would be necessary to consider the provisions of section 401 of Cr.P.C. which lays down the scope and extent of the power which can be exercised by the High Court . Section 401 of Cr. P.C reads as under:-

"**401. High Court's powers of revision -** (1) In the case of any proceedings the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of

acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice to do so, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

A perusal of the aforesaid provision clearly discloses that the power of the High Court when it exercises its jurisdiction under section 401 in revision filed by original complainant is

very limited. Sub-section (3) of section 401 clearly lays down that, in any event, the High Court cannot convert an order of acquittal into one of conviction while exercising its revisional jurisdiction under section 401.

8. In the present case, unfortunately, the State Government has chosen not to prefer an appeal. The submission of the learned Counsel appearing on behalf of the petitioner that this Court should direct the State to file an appeal cannot be accepted. The High Court cannot issue such direction under section 401 or under any other provisions of Cr.P.C. Unfortunately, since the appeal has not been filed, the scope and extent of inquiry under revisional jurisdiction is very limited. The High Court, at the most, can remand the matter to the trial court if it finds that the finding recorded by the trial court is perverse or is based on extraneous considerations or is based on the material which is not there on record. The High Court cannot substitute its own reasons for the purpose of setting aside the judgment of the trial court on an application filed by a private complainant if two views are possible and the trial court has

taken one view which is plausible. In the present case the trial court has, by a reasoned order, acquitted the accused and recorded its reasons for not having accepted the version of the prosecution. I do not see any infirmity in the said judgment and order. Even if a different view could have been taken, this is not a fit case where matter should be remanded back for the purpose of fresh inquiry or trial. There is no illegality in the procedure which has been followed by the Magistrate. The Supreme Court way back in 1951 in the case of D. Stephens Vs. Nosibolla reported in AIR (38) 1951 SC 196 has further cautioned the High Court while exercising its revisional jurisdiction under section 439 of the Cr. P.C. (Old). It would be appropriate to reproduce what the Supreme Court has said in its own language in para 10 of the said judgment, which reads as under:-

> "(10) The revisional jurisdiction conferred on the H.C. under S. 439, Criminal P.C., is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Govt. has a

> right of appeal under S. 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Ct. has taken a wrong view of the law or misappreciated the evidence on record. As already pointed out, there has been no such error in the present case, on the other hand, it seems to us that on both the previous occasions, the learned Chief Presidency Mag. was right in holding that the accused was not guilty of any offence under Ss. 25 & 26, Merchant Shipping Act."

9. The ratio of the said judgment is squarely applicable to the facts of the present case. In my view, there is no reason to interfere with the judgment and order passed by the Magistrate. Apart from every thing else, incident in question

has taken place on 23/09/1986. The Magistrate by his judgment and order dated 4/10/1996 has acquitted the accused. Though the present Revision Application was admitted in 1996, it has come up for hearing in 2006. More than 20 years have elapsed from the date of the original incident. Even if the submissions of the learned Counsel for the petitioner are accepted, no useful purpose would be served by directing the Magistrate to record the evidence afresh for retrial.

10. The learned Counsel appearing on behalf of the petitioner has relied upon number of judgments of the Supreme Court and various other judgments.

11. The learned Counsel appearing on behalf of the petitioner relied upon the Judgment of Punjab and Haryana High Court in the case of Mukhtiara and Ors. Vs. State of Haryana reported in 1998 CR.L.J. 899 wherein it was held by the Punjab and Haryana High Court that merely because there was a failure on the part of eye-witnesses to give full description of injuries inflicted by the accused on the person

injured would not be sufficient for discarding the said testimony. He further relied upon the judgment of the Supreme Court in the case of Shivaji Sahebrao Bobade and another Vs. State of Maharashtra reported in AIR 1973 SC 2622 wherein the Supreme Court has held that the conviction by High Court in appeal from acquittal for the offence punishable under section 423 was proper. He further relied upon the judgment of the Supreme Court in the case of State of H.P. Vs. Mast Ram reported in (2004) 8 SCC 660 wherein the Supreme Court held that the evidence of related witness should be examined with caution but cannot be discarded merely on the ground of relationship with the victim. He has relied upon the judgment of the Supreme Court in the case of State of U.P. Vs. Jagdeo and Others reported in (2003) SCC 456 wherein the Supreme Court observed that merely because the witnesses were interested that by itself would not be a ground for rejecting their evidence. He has relied upon the judgment of the Supreme Court in the case of Main Pal and another Vs. State of Haryana and others reported in (2004) 10 SCC 692 wherein the Supreme Court, while considering the provisions of

section s 386 and 378, laid down the scope and power of the High Court to interfere with the order of acquittal in appeal against acquittal and held that the appellate court could review the evidence and interfere for compelling reasons where admissible evidence has been unreasonably and unjustifiably ignored.

Some of the judgments pertain to power which is to be exercised by the High Court while hearing the regular appeal against acquittal. The parameters of appreciation of evidence in regular appeal and in revision are entirely different and distinct. All the judgments on which reliance has been placed by the learned Counsel appearing on behalf of the petitioner are in cases where the High Court was exercising its appellate jurisdiction. I am afraid that ratio of none of the judgments on which reliance is placed by the learned Counsel for the petitioner can apply to the facts of the present case.

12. Under the circumstances, Criminal Revision Application is dismissed and the same is disposed of accordingly.

(V.M. KANADE, J.)